Supreme Court, U.S.
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No. 09-____

IN THE

# Supreme Court of the United States

ZURICH AMERICAN INSURANCE CO., *et al.*,
*Petitioners*,

v.

PIONEER NATURAL RESOURCES USA, INC. AND
PIONEER NATURAL RESOURCES COMPANY,
*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

J. CLIFTON HALL, III
CANDACE A. OURSO
STEPHANIE R. TIPPITT
WESTMORELAND HALL, P.C.
2800 Post Oak Blvd.
Williams Tower
64th Floor
Houston, Texas 77056
(713) 871-9000

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

* Counsel of Record

*Counsel for Petitioners*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## QUESTION PRESENTED

In a case removed under the Convention on the Recognition and Enforcement of Arbitral Awards, 9 U.S.C. § 205, whether an order denying a motion to compel arbitration and remanding to state court is appealable under the Federal Arbitration Act's express right of interlocutory appeal from such denials, 9 U.S.C. § 16(a)(1)(C), notwithstanding 28 U.S.C. § 1447(d).

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners, who were appellants below, are Syndicate 457 (a Lloyd's underwriting syndicate); Syndicate 33 (a Lloyd's underwriting syndicate); Syndicate 2020 (a Lloyd's underwriting syndicate); Syndicate 1225 (a Lloyd's underwriting syndicate); Syndicate 5000 (a Lloyd's underwriting syndicate); Syndicate 1036 (a Lloyd's underwriting syndicate); Syndicate 1209 (a Lloyd's underwriting syndicate); Syndicate 510 (a Lloyd's underwriting syndicate); Syndicate 2987 (a Lloyd's underwriting syndicate); Navigators Insurance Company; Aspen Insurance UK Limited; Houston Casualty Company; Commonwealth Insurance Company; Gard Marine & Energy Ltd.; Zurich American Insurance Company; Mutual Marine Office, Inc. on behalf of N.Y. Marine & General Ins. Co.; Arch Insurance Company; Liberty Mutual Insurance Company; American Offshore Insurance Syndicate; XL Specialty Insurance Company (through XL Marine & Offshore Energy).

The Respondents, who were appellees below, are Pioneer Natural Resources USA, Inc. and Pioneer Natural Resources Company.

The parent company of Syndicate 457 (a Lloyd's underwriting syndicate) is Munich Re and no other publicly held company owns 10% or more of its stock.

The parent companies of Syndicate 33 (a Lloyd's underwriting syndicate) are Hiscox Dedicated Corporate Member Limited, and Hiscox Group, and no other publicly held company owns more than 10% of its stock.

The parent company of Syndicate 2020 (a Lloyd's underwriting syndicate) is Catlin Group Ltd., and no other publicly held entity owns more than 10% of its stock.

The parent companies of Syndicate 1225 (a Lloyd's underwriting syndicate) are AEGIS Insurance Services Inc and Associated Electric & Gas Insurance Services Ltd. (AEGIS), and no other publicly held company owns 10% or more of its stock.

The parent company of Syndicate 5000 (a Lloyd's underwriting syndicate) is The Travelers Company, Inc., and no other publicly held company owns 10% or more of its stock.

The parents company of Syndicate 1036 (a Lloyd's underwriting syndicate) are QBE Underwriting Limited and QBE Insurance Group, and no other publicly held company owns 10% or more of its stock.

The parent companies of Syndicate 1209 (a Lloyd's underwriting syndicate) are Dornach Limited (lead underwriter) and XL Market Group Limited and no other publicly held company owns 10% or more of its stock.

The parent companies of Syndicate 510 (a Lloyd's underwriting syndicate) are Kiln Group Limited, Tokio Marine Nichido Fire Insurance Co. Ltd., and Tokio Marine Holdings, Inc., and no other publicly held company owns 10% or more of its stock.

The parent companies of Syndicate 2987 (a Lloyd's underwriting syndicate) are Brit UW Ltd., Brit Underwriting Holdings Ltd., Brit Overseas Holdings S.a.r.l., Brit Group Holdings B.V., and Brit Insurance Holdings, N.V., and no other publicly held company owns 10% or more of its stock.

The parent company of Navigators Insurance Company is The Navigators Group, Inc., and no other publicly held company owns 10% or more of its stock.

The parent companies of Aspen Insurance UK Limited are Aspen (UK) Holdings Limited and Aspen Insurance Holdings Limited, and no other publicly held company owns 10% or more of its stock.

The parent companies of Houston Casualty Company are Illium Inc. and HCC Insurance Holdings, Inc., and no other publicly held company owns 10% or more of its stock.

The parent company of Commonwealth Insurance Company is Northbridge Financial Corporation, and no other publicly held company owns 10% or more of its stock.

The parent company of Gard Marine & Energy Ltd. is Gard P&I (Bermuda) Ltd., and no other publicly held company owns 10% or more of its stock.

The parent companies of Zurich American Insurance Company are Zurich Holding Company of America, Inc., Zurich Insurance Company Ltd., and Zurich Financial Services Ltd., and no other publicly held company owns 10% or more of its stock.

The parent company of both Mutual Marine Office, Inc. and New York Marine and General Insurance Company is NYMAGIC, INC., and no other publicly held company owns 10% or more of their stock.

The parent companies of Arch Insurance Company are Arch Insurance Group and Arch Capital Group Ltd., and no other publicly held company owns 10% or more of its stock.

The parent company of Liberty Mutual Insurance Company is Liberty Mutual Holding Company, Inc., and no other publicly held company owns 10% or more of its stock.

American Offshore Insurance Syndicate has no parent corporation and no publicly held company owns 10% or more of its stock.

The parent companies of XL Specialty Insurance Company are Intercargo Corporation and XL Capital, Ltd., and no other publicly held company owns 10% or more of its stock.

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IN THE

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ZURICH AMERICAN INSURANCE CO. *et al.*,

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v.

PIONEER NATURAL RESOURCES USA, INC. AND PIONEER NATURAL RESOURCES COMPANY,

*Respondents*.

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioners Zurich American Insurance Co. *et al.* (collectively, the "Underwriters") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The judgment of Fifth Circuit, issued without an opinion, is reproduced at page 1a of the Appendix to this petition ("App."). The unpublished opinion of the District Court is reproduced at App. 24a.

## JURISDICTION

The judgment of the Fifth Circuit was entered on December 17, 2009. App. 1a. That court denied a timely filed petition for rehearing en banc on

January 27, 2010. App. 39a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The text of the relevant statutes is set forth at App. 41a.

## INTRODUCTION

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") is an international treaty designed "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). To ensure that our nation meets these treaty obligations under a uniform body of federal law, and to protect the strong federal policy favoring arbitration, Congress provided a broad and absolute right of removal to federal court for any claim that "relates to" an arbitration agreement covered by the Convention, and an interlocutory right to appeal any order denying a motion to compel arbitration under the Convention. *See* 9 U.S.C. §§ 16(a)(1)(C), 205.

In this case, however, the lower courts thwarted Congress's scheme in a manner that conflicts with decisions of this Court and other circuits. The District Court held that the case was properly removed under the Convention, but subsequently denied the mandatory federal forum on the ground that state law purportedly nullified any right to arbitration. The Fifth Circuit then refused to recognize the clear statutory appeal right of that decision denying arbitration, simply because that decision was issued simultaneously with—rather

than before—a remand decision purportedly non-appealable under 28 U.S.C. § 1447(d).

As a dissenting judge has lamented, the Fifth Circuit precedent relied upon by Respondents, by allowing this result, creates a "Catch-22 problem [that] cries out for immediate remedy from the Supreme Court." *Dahiya* v. *Talmidge Int'l, Ltd.*, 371 F.3d 207, 214 n.3 (5th Cir. 2004) (DeMoss, J., dissenting). Since that time, the need for this Court's review has only increased. Recently, the Court held in *Arthur Andersen LLP* v. *Carlisle*, 129 S. Ct. 1896, 1900-01 (2009), that an order refusing arbitration based on the purported absence of an arbitration agreement is appealable as of right, regardless of the merits of that issue. And the Court held in *Osborn* v. *Haley*, 549 U.S. 225, 240-44 (2007), that any conflict between a specialized removal scheme and the general prohibition on appealing remand orders in 28 U.S.C. § 1447(d) is resolved in favor of the more specific statute establishing conclusive removal jurisdiction that federal courts cannot revise.

The Fifth Circuit's law conflicts with these decisions. And it further conflicts with the holdings of other circuits that recognize a right to appeal decisions rejecting arbitration, regardless of whether those appealable decisions implicate remand issues. The result has been a denial of both the mandatory federal forum for Convention arbitration issues, and the mandatory right to federal appellate review, relegating these critical federal issues to disuniform state court review. This Court's review is warranted given these conflicts and the national and international importance of ensuring a uniform body

of federal law that upholds the United States' treaty obligations under the Convention.

Alternatively, and at a minimum, the Court should remand this case to the Fifth Circuit for it to explain its reasoning. The Fifth Circuit was the first and only lower court that could opine on the question of appellate jurisdiction in this case, yet it failed to do so. This Court should at the very least require the Fifth Circuit to explain its decision to override important federal rights.

## STATEMENT OF THE CASE

### 1. The Underlying Dispute.

Pioneer owned and operated offshore oil and gas platforms and other facilities in the Gulf of Mexico. In 2005, Hurricane Rita passed over one of Pioneer's platforms, causing it to collapse. This action arose out of disputes over insurance claims filed by Pioneer related to that platform. App. 3-4a.[1]

Pioneer asserted claims under an Energy Package Policy (the "Package Policy"). App. 4a. Each of the Underwriters provided coverage under that policy. App. 6a. Section One of the policy covers physical damage to the platform. App. 25a. Section Two covers control of the well, and other costs. App. 25a. Section Three provides excess liability coverage. App. 6a, 25a. The Underwriters include citizens or subjects of one or more foreign nations. App. 16a.

Section Three's excess coverage is above the limits of an existing policy (the "AEGIS Policy") issued to Pioneer by Associated Electric & Gas Insurance

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[1] Citations to portions of the district court record not included in the Appendix are cited by the district court docket number, (*e.g.*, "Dkt. 1").

Services Ltd. App. 6a. Rather than existing as stand-alone coverage, Section Three's excess coverage "follow[s] the terms and conditions" of the underlying AEGIS Policy. App. 7a. The AEGIS Policy, in turn, provides that any controversy or dispute arising out of or relating to the policy "shall be settled by binding arbitration" subject to specified procedures, and that these "shall be the sole and exclusive procedures for the resolution of any such controversy or dispute." App. 33a; Dkt. 1, Ex. D, at 14.

Section Three of the Package Policy contains various specific exceptions to provisions of the AEGIS Policy, but none of those exceptions alters the incorporated mandatory arbitration provision. Dkt. 1, Ex. C, at 67. Nor would it have made sense for Section Three to have eliminated the arbitration requirement, since that section provided only excess coverage under the same terms as the AEGIS Policy, and the AEGIS Policy requires (and is currently undergoing) arbitration to resolve any disputes. App. 7a.[2]

**2. Removal Under The Convention.**

The United States is a signatory to the Convention (also called the New York Convention), which covers all commercial arbitration agreements except those that are both (1) entirely between citizens of the United States and (2) do not involve foreign property,

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[2] Separate from this provision, the General Insuring Conditions of the Package Policy also contained a permissive arbitration provision "[i]n the event it is mutually agreed by [Pioneer] and the Underwriters to arbitrate any dispute under this Policy." App. 31a. Nothing in this general provision, however, purports to alter the mandatory arbitration provision incorporated into Section Three.

envisage performance or enforcement abroad, or have some other reasonable relation with a foreign country. 9 U.S.C. § 202.

To carry out the United States' international obligations under the Convention and to ensure a uniform federal interpretation of it, Congress provided that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States," 9 U.S.C. § 203, and created original federal jurisdiction over all such actions or proceedings, without regard to the amount in controversy. *Id.* In addition, in 9 U.S.C. § 205 ("Section 205"), Congress broadly provided defendants with an absolute right of removal to federal court—exercisable at any time before trial—whenever "the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention." 9 U.S.C. § 205.

Thus, to be removable under Section 205, a case need only "relate to" an arbitration agreement falling under the Convention, which includes commercial agreements involving at least one non-U.S. party that provide for arbitration in a signatory nation. *Sedco, Inc.* v. *Petroleos Mexicanos Mexican Nat. Oil Co.*, 767 F.2d 1140, 1144 (5th Cir. 1985). If these minimal conditions are satisfied, Section 205 provides an absolute right of removal to federal court.

### 3. Proceedings In The District Court.

On August 8, 2007, Pioneer filed suit against the Underwriters under the Package Policy in Louisiana state court, claiming damages of over $50 million. App. 25a. On February 8, 2008, Pioneer filed an

amended petition in state court that specifically sought recovery under Section Three's excess coverage. App. 26a.[3]

Because this case "relates to" an arbitration agreement covered by the Convention, the Underwriters removed the case to the Middle District of Louisiana on April 18, 2008, pursuant to the plain terms of Section 205. Dkt. 1. The Underwriters then filed a motion to stay the litigation pending arbitration. Dkt. 3. Pioneer filed a competing motion to remand the case to state court. Dkt. 5. The District Court referred the motions to the magistrate judge to make an initial report and recommendation.

The parties did not dispute that the underlying AEGIS Policy incorporated into Section Three provides for mandatory arbitration. Nor did Pioneer credibly argue that the dispute in no way "relates to" a commercial arbitration agreement covered by the Convention. Indeed, Pioneer and AEGIS were then, and are now, engaging in mandatory arbitration in the U.S. of disputes under the AEGIS Policy, relating to many of the same coverage issues that are the subject of this case involving the excess insurers. App. 7a. Instead, Pioneer moved for remand asserting that, as a matter of contract interpretation, the "following form" provision in Section Three did not incorporate the AEGIS Policy's mandatory arbitration provision into the Package Policy, and therefore that its dispute with the Underwriters was not subject to mandatory arbitration. Dkt. 5.

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[3] Recently, Pioneer has made a demand for $188,100,000. *See* Offer of Judgment, *Pioneer Nat. Resources USA, Inc.* v. *Zurich Am. Ins. Co., et al.*, No. 558,017 (La. Dist. Ct., filed Apr. 22, 2010).

On January 6, 2009, the magistrate judge issued a Report and Recommendations rejecting Pioneer's contentions that there was no removal jurisdiction under Section 205. App. 3a. She recommended denial of Pioneer's motion to remand, expressly finding that "*the litigation relates to an arbitration agreement that falls under [the Convention], and therefore the matter was properly removed pursuant to 9 U.S.C. § 205.*" *Id.* at 19a (emphasis added).

The magistrate judge emphasized that Section 205 removal jurisdiction is determined from the petition for removal itself, and that *Beiser* v. *Weyler*, 284 F.3d 665, 672 n.7 (5th Cir. 2002), required the court to keep[] the jurisdictional and merits inquiries separate." App. 10a. Moreover, she noted "the importance of a [party's] right to appeal a decision on a motion to stay or compel arbitration" App. 11a. "Conscious of these issues," the magistrate judge was "cautious not to delve into the merits and focuse[d] on whether the allegations made in the amended petition or notice of removal are sufficient to establish jurisdiction." *Id.*

Applying these principles to the parties' pending motions, the magistrate judge found that questions involving whether the parties will eventually be compelled to arbitration based on the interpretation the policies were "inapplicable" to the motion to remand. *Id.* Pioneer's arguments about the intent of the parties to incorporate that provision into the Package Policy were "not the issue before the Court on the motion to remand," App. 14a, but instead were "merits-based inquiries, separate from the Court's determination of whether it has jurisdiction to decide the case either way." *Id.*

The magistrate judge first found the Underwriters' allegations sufficient on their face to establish that the arbitration agreement incorporated under Section 3 of the Package Policy falls under the Convention under 9 U.S.C. § 202, because it involved non-U.S. parties and provided for arbitration in a convention signatory. App. 16a. Accordingly, the judge found that removal was proper because the claims for coverage under Section Three "relate to" a Convention arbitration agreement under the "extremely loose" requirements of 9 U.S.C. § 205—regardless of whether such claims would eventually be stayed or compelled to arbitration following a determination of the merits of Pioneer's contractual arguments. App. 17a. The judge also determined that supplemental jurisdiction existed over Pioneer's claims for coverage under Section Two of the Package Policy, regardless of whether those claims might also support removal on their own *Id.*

Over Pioneer's objections, the District Court approved the magistrate judge's Report and Recommendations in its entirety on February 10, 2009, and "adopt[ed] it as the court's opinion herein." App. 22a. The court accordingly denied Pioneer's motion for remand, *id.*, adopting the magistrate judge's determination that "the litigation relates to an arbitration agreement that falls under [the Convention], and therefore the matter was properly removed pursuant to 9 U.S.C. § 205." App. 19a, 22a.

That determination by the District Court that this case satisfies every requirement of Section 205 should have been the end of the jurisdictional inquiry. The court, however, misunderstood its subsequent role. After the court determined that removal had been proper, the Underwriters filed a

motion to compel arbitration of all claims pursuant to 9 U.S.C. § 206 or, in the alternative, to stay litigation of some claims pending arbitration of the claims under Section Three of the Package Policy. Dkt. 74. Pioneer opposed, and filed a second motion to remand, this time seeking remand only of its claims for coverage under Section Two. Dkt. 81.

On October 7, 2009, the District Court simultaneously ruled on both the Underwriters' motion to compel arbitration, and Pioneer's motion for partial remand, holding that state law precluded the Underwriters' reliance on the mandatory arbitration provision. The court held that "the federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties; instead ordinary contract principles determine who is bound." App. 31a. (citations omitted). The court then parsed the insurance policies, concluding that the mandatory arbitration provision in the AEGIS Policy conflicted with the permissive arbitration provision in the general insuring conditions of the Package Policy. Under state law, the court held that the resulting ambiguity must be construed in favor of the insured, and that "no valid agreement exists between the parties to submit the disputes to arbitration." App. 36a.

Having concluded as a matter of contract interpretation that that "the Package Policy does not present a valid agreement to arbitrate," the court remanded the entire case, purportedly for lack of subject matter jurisdiction. In its view, "[b]ecause the Convention only applies to valid commercial arbitration agreements in international contracts the court also concludes that the Convention is not applicable to the dispute before the court and federal question

jurisdiction is, therefore, absent." App. 37a. Under governing Fifth Circuit law, this determination also resulted in a denial of the Underwriters' motion to compel arbitration or stay litigation, because "any order remanding [a matter to state court] for lack of subject matter jurisdiction necessarily denies all other pending motions." *Dahiya*, 371 F.3d at 210. *Accord Carlson* v. *Arrowhead Concrete Works, Inc.*, 445 F.3d 1046, 1052 (8th Cir. 2006).

**4. Proceedings in the Court of Appeals.**

On October 8, 2009, the Underwriters filed a timely notice of appeal to the Fifth Circuit from the District Court's order. Dkt. 101. Pioneer filed a motion to dismiss the appeal for lack of jurisdiction, relying principally on two Fifth Circuit cases for the view that after a district court denies arbitration under the Convention and remands a case to state court for lack of subject matter jurisdiction, 28 U.S.C. § 1447(d) ("Section 1447(d)") bars a federal appellate court from reviewing the arbitration ruling. Appellees' Mot. to Dismiss, at 3-8 (citing *Dahiya*, 371 F.3d 207, and *Certain Underwriters at Lloyd's, London* v. *Warrantech Corp.*, 461 F.3d 568 (5th Cir. 2006)).

The Underwriters opposed the motion, contending that appellate jurisdiction existed under 9 U.S.C. § 16(a)(1) ("Section 16(a)(1)"), which provides that "[a]n appeal may be taken from * * * an order * * * denying an application under section 206 of this title [*i.e.*, the Convention] to compel arbitration." 9 U.S.C. § 16(a)(1)(C). The Underwriters also explained that Section 1447(d) does not abrogate the express appeal right provided under Section 16(a)(1). Appellants' Opp. to Motion to Dismiss, at 8-9.

On December 17, 2009, the Fifth Circuit granted the motion to dismiss the appeal in a summary order. Even though this was the first opportunity for any court to rule on the question of appellate jurisdiction in this case, the Fifth Circuit granted the motion without any further briefing or argument, without any opinion, and without any explanation of its reasoning or citation of authority. App. 1a. On January 27, 2010, the Fifth Circuit denied the Underwriters' timely petition for rehearing en banc, again without any explanation or opinion. App. 39a.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS.

#### A. Under This Court's Precedents, Section 16(a)(1) Confers A Mandatory Right To Appeal Decisions Denying Arbitration.

The language of 9 U.S.C. § 16(a)(1)(C) could not be more clearly applicable to this case: "[a]n appeal may be taken from * * * an order * * * denying an application under section 206 of this title to compel arbitration." The Underwriters filed an application to compel arbitration under 9 U.S.C. § 206, which pertains specifically to agreements governed by the Convention. *See* Dkt. 74. The District Court denied that request because, in the Court's view, the asserted arbitration agreement did not apply to the parties' dispute. Accordingly, Section 16(a)(1) unequivocally provides a right of immediate appellate review, regardless of the merits of the District Court's ruling.

1. This result is compelled not only by the plain terms of that statute, but also by the Court's recent

decision in *Arthur Andersen*, which established a "categorical, bright-line approach" to jurisdiction under Section 16(a)(1). *Conrad* v. *Phone Dirs. Co.*, 585 F.3d 1376, 1383 (10th Cir. 2009). There, the petitioners had moved for a stay of litigation pending arbitration. As in this case, the district court denied the request because, after examining the relevant agreements, it believed that the asserted arbitration agreement did not apply to the dispute. The party seeking arbitration appealed under Section 16(a)(1).[4] The court of appeals dismissed the appeal for want of jurisdiction, based on its view that there was no agreement by the parties to arbitrate.

This Court reversed, holding that under Section 16(a)(1)'s "clear and unambiguous" terms, "any litigant who asks for a stay [pending arbitration] is entitled to an immediate appeal from denial of that motion—regardless of whether the litigant is in fact eligible for a stay." *Arthur Andersen*, 129 S. Ct. at 1900. The court of appeals had jurisdiction simply because the petitioner had requested arbitration, regardless of whether that request was right or wrong. A court of appeals may not "look through" the pleadings to determine appealability under Section 16(a)(1). Rather, jurisdiction over the appeal is determined merely by "focusing upon the category of order appealed from." *Id.* (citation omitted). This straightforward determination is "immeasurably more simple and less factbound than the threshold determination * * * whether the litigant was a party

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[4] *Arthur Andersen* involved the appeal of an order denying a stay of litigation pending arbitration, which is appealable under Section 16(a)(1)(A). There is no relevant difference between Section 16(a)(1)(A) and Section 16(a)(1)(C), which covers orders denying motions to compel arbitration under the Convention.

to the contract." *Id.* at 1901. That latter question is reserved until "after the court has accepted jurisdiction over the case." *Id.*

Under *Arthur Andersen*, the Fifth Circuit should have looked only to the fact that the District Court had rejected the Underwriters' application to compel arbitration in order to conclude that it had appellate jurisdiction under Section 16(a)(1). Instead, the court engaged in a different inquiry. It dismissed the appeal based on Pioneer's invocation of Fifth Circuit precedent which, according to Pioneer, bars appellate jurisdiction under Section 1447(d) whenever an otherwise appealable denial of arbitration results in a remand. *See Dahiya*, 371 F.3d at 210 ("We lack jurisdiction under § 16 because the denials of Appellants' motions to stay and to compel arbitration accompanied a remand for lack of subject matter jurisdiction."). That was wrong. Under *Arthur Andersen*, the order denying arbitration was expressly appealable under Section 16(a)(1) notwithstanding the District Court's conclusion that the parties had not agreed to arbitrate. Whether the District Court was right or wrong about that issue is a question on the merits, not of jurisdiction.

2. The import of *Arthur Andersen* is not undermined by any purported conflict between the command of Section 16(a)(1) that "an appeal may be taken" from an order denying arbitration, and the language of Section 1447(d) providing that "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." As the Court made clear in *Osborn* v. *Haley*, *supra*, any such conflict must be resolved in favor of a specialized removal scheme established by Congress, which in this case mandates a non-discre-

tionary federal forum for all claims that "relate to" arbitration agreements governed by the Convention.

In *Osborn*, the Court held that Section 1447(d) did not bar an appeal of a remand order issued in contravention of a specialized removal scheme. In the scheme at issue there (the Westfall Act), removal is authorized whenever the Attorney General certifies that a defendant federal employee was acting within the scope of official duties. In *Osborn*, the case had been removed upon such a certification, but the district court remanded on the ground that the certification had been improper. This Court held that it had jurisdiction to consider an appeal of that remand order, notwithstanding Section 1447(d).

The Court held that Congress gave district courts no authority to return cases to state courts on the ground that certification was unwarranted; the certification itself determines removal jurisdiction. 549 U.S. at 241-42. If a district court later concludes that the certification decision was incorrect, it may override that decision for purposes of trial, but that would not destroy federal jurisdiction. *Id.* at 242. Because the certification provides mandatory federal jurisdiction, appellate courts likewise have jurisdiction over any remand decision notwithstanding Section 1447(d). Because Congress's specialized removal scheme and the general language of Section 1447(d) were facially at odds, "only one can prevail." *Id.* at 244. The specialized scheme prevailed because it was "tailor-made" for the circumstances and provided a federal forum selection that was "beyond the ken of district courts to revise." *Id.*

The same is true with cases removed under the Convention. As even the Fifth Circuit has recognized, Section 205 is "one of the broadest

removal provisions * * * in the statute books." *Acosta* v. *Master Maint. & Constr., Inc.*, 452 F.3d 373, 377 (5th Cir. 2006). It provides specialized removal jurisdiction whenever "the subject matter of an action or proceeding pending in a State court *relates to* an arbitration agreement * * * falling under the Convention." 9 U.S.C. § 205. This very "low bar" for removal jurisdiction under Section 205 means that "whenever an arbitration agreement falling under the Convention could conceivably affect the outcome of the plaintiff's case, the agreement 'relates to' the plaintiff's suit." *Beiser*, 284 F.3d at 669. Thus, the district court "will have jurisdiction under § 205 over just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense," as long as the assertion is not "absurd or impossible." *Id.*

"So generous is the removal provision" that "the general rule of construing removal statutes strictly against removal 'cannot apply to Convention Act cases because in these instances, Congress created special removal rights to channel cases into federal court.'" *Acosta*, 452 F.3d at 377 (citation omitted). By providing for "easy removal" under Section 205, Congress intended for the district courts to make a quick and conclusive assessment of their jurisdiction on the pleadings alone. *Beiser*, 284 F.3d at 674, 670-71.[5] Once it is determined that a case "relates to" an

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[5] To accomplish this goal, Section 205 provides that "[t]he procedure for *removal* of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal." The *Dahiya* decision incorrectly jumped to the conclusion that this incorporates Section 1447(d)'s bar on appealing *remand* orders. *See* 371 F.3d

arbitration agreement covered by the Convention—as the District Court determined here, App. 19a, 22a, statutory removal jurisdiction exists. Once conferred, that jurisdiction cannot be ousted by any merits determination.

As in *Osborn*, Congress's specialized removal jurisdiction is conclusive whenever it is found that a case relates to an arbitration agreement, and the express bestowal of appellate jurisdiction over any decision denying that mandatory federal forum takes precedence over the more general language of Section 1447(d).[6] Like the certification in *Osborn*, a district court's determination that a case relates to an arbitration agreement under Section 205 is conclusive of the jurisdictional inquiry, and that statute calls for no further threshold inquiry. 549 U.S. at 243. Any later remand for lack of subject matter jurisdiction is unauthorized and therefore cannot oust appellate jurisdiction to review the basis for that order.

As explained by the dissenting judge in *Dahiya*—the chief precedent invoked by Pioneer—the Fifth Circuit's law precluding appellate review conflicts with that clear intent of Congress, and "cries out for immediate remedy from the Supreme Court." *Dahiya*, 371 F.3d at 214 n.3 (DeMoss, J., dissenting). In an ordinary case, removal merely changes the

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at 210. Removal is addressed under 28 U.S.C. § 1446, not Section 1447(d), which addresses remands.

[6] *Cf. Powerex Corp.* v. *Reliant Energy Servs.*, 551 U.S. 224, 240 (2007) (Breyer, J., dissenting) (*Osborn* recognizes that "even a statute silent on the subject [of remand] can create an important conflict with § 1447(d)'s 'no appellate review' instruction," which is resolved "by reading a later more specific statute as creating an implicit exception to § 1447(d)").

forum in which the same case will be tried. *Id.* The non-appealability of a remand order under Section 1447(d) is just "a reflection of the congressional policy to prevent delays of the trial on the merits by appeals over validity of the remand order." *Id.* But under Section 205, "the purpose is to allow the removing party to assert in federal court the existence of an agreement to arbitrate under the Convention and compel such arbitration in lieu of the trial that would otherwise occur in the state court." *Id.* Removal under Section 205 "raises the issue of whether there should be a trial on the merits at all; and the immediate appeals process authorized under 9 U.S.C. § 16 reflects the strong congressional policy of giving preference to arbitration over litigation as to agreements covered by the Convention." *Id.* *See also* H.R. Rep. 100-889, at 36-37 (1988).

Here, the District Court expressly determined that the case was properly removed under Section 205, adopting the magistrate judge's analysis of jurisdiction as its own opinion. App. 19a, 22a. Subsequently, the District Court by its own acknowledgement engaged in a merits inquiry, interpreting the contracts to determine whether a valid arbitration agreement existed. App. 36a. The District Court was not then authorized to issue a remand for lack of jurisdiction, because federal removal jurisdiction had been conclusively determined. Indeed, the court could not have interpreted the insurance agreements without jurisdiction to engage in that inquiry. As in *Osborn*, then, the court of appeals' jurisdiction could not be barred by Section 1447(d). Rather, the denial of the motion to compel based on the District Court's ruling

that no valid agreement to arbitrate existed was immediately appealable under Section 16(a)(1)(C).

Accordingly, the decision below conflicts with both *Arthur Andersen*'s interpretation of Section 16(a), and *Osborn*'s holding that a conflict with Section 1447(d) is resolved in favor of a comprehensive statute that conclusively determines federal jurisdiction. The Court should grant certiorari to rectify this departure from this Court's precedents.

### B. The Decision Below Conflicts With The Decisions of Other Circuits.

The District Court initially determined that it had removal jurisdiction under the Convention. App. 22a. When it later concluded that there was no valid agreement to arbitrate, it should have simply denied the Underwriters' motion to compel arbitration, thereby allowing the Underwriters to immediately appeal that denial under Section 16(a)(1)(C). This is what would have happened in most circuits. But instead, the court denied the motion to compel arbitration by tacking on an unauthorized remand order, which the Fifth Circuit found to nullify appellate jurisdiction. The Fifth Circuit's decision conflicts with decisions of other circuits.

The Ninth Circuit has held that jurisdiction exists under Section 16(a)(1), notwithstanding Section 1447(d), to review an order denying enforcement of an arbitration agreement under the Convention and simultaneously remanding to state court. In *Reddam* v. *KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006), the district court held that it had removal jurisdiction under the Convention, but later remanded when the arbitration panel's refusal to decide the case led the court to believe federal

jurisdiction was no longer present. *Id.* at 1059. Because the district court had already found that it had jurisdiction under the Convention, the Ninth Circuit held that the later occurring event did not destroy federal jurisdiction and that Section 1447(d) therefore did not preclude an appeal of the order. *Id.* But independent of that holding, the Ninth Circuit also expressly held that it had jurisdiction to review the denial of arbitration under Section 16(a)(1). *See id.* at 1059 n.8 ("Beyond that, we have jurisdiction under 9 U.S.C. § 16(a)(1)(A) & (B) to review the district court's conclusion that it could no longer enforce the arbitration agreement.").

There is thus a basic divergence among the lower courts. *Cf. Restoration Pres. Masonry* v. *Grove Europe*, 325 F.3d 54, 59 (1st Cir. 2003) (noting, but not resolving, circuit split). In the Fifth Circuit, unlike the Ninth, a determination of non-arbitrability in a case removed under the Convention is entirely unreviewable, because a finding that the parties did not agree to arbitrate a dispute divests the trial court of removal jurisdiction. *See Dahiya*, 371 F.3d 207; *Warrantech*, 461 F.3d 568. The Eighth and Fourth circuits have ruled the same way. *See Transit Cas. Co.* v. *Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir. 1997); *Severonickel* v. *Reymenants*, 115 F.3d 265, 267 (4th Cir. 1997).

By contrast, the Second Circuit has correctly held that a non-frivolous assertion that a claim "relates to" an arbitration agreement under the Convention confers federal jurisdiction that is not divested by a subsequent merits determination of arbitrability. In *Sarhank Group* v. *Oracle Corp.*, 404 F.3d 657, 660 (2d Cir. 2005), the court held that because

defendants' allegations of an arbitration agreement were "not immaterial, frivolous, or made solely to obtain jurisdiction," the district court had subject matter jurisdiction, and questions regarding the validity of the agreements were "merits questions," that did not involve a lack of subject matter jurisdiction, "although cases confusing these issues are frequently found in the reports." *Id.*

Similarly, in *Sandvik AB* v. *Advent Int'l Corp.*, 220 F.3d 99, 100 (3d Cir. 2000), the district court denied a motion to compel arbitration, holding that it could not order arbitration without determining the validity of the underlying contract. *Id.* at 102. On appeal, the Third Circuit held that it had jurisdiction under Section 16(a)(1) to review the denial, notwithstanding the absence of a finding of a valid arbitration agreement. *Id.* at 100. As the court held, "[i]t is precisely this sort of appeal that the FAA's interlocutory appeal provisions were designed to address." *Id.* "Refusing [the] appeal could circumvent the FAA's clear purpose of enforcing binding arbitration agreements." *Id.* at 104.[7]

The Fifth Circuit's dismissals in this and similar cases, despite the clear language of Section 16(a)(1), have had precisely this effect of "circumvent[ing] the FAA's clear purpose of enforcing binding arbitration

[7] *See also Koveleskie* v. *SBC Capital Mkts. Inc.*, 167 F.3d 361, 363 (7th Cir. 1999) (holding that, despite the district court's declaration of a need for discovery before a decision could be reached on the arbitration issue, there was no doubt that the requested order was denied, and thus appealable); *McLaughlin Gormley King Co.* v. *Terminix Int'l Co., L.P.*, 105 F.3d 1192, 1193 (8th Cir. 1997) (reviewing a district court's refusal to order arbitration prior to discovery on issue of arbitrability because "an order that favors litigation over arbitration * * * is immediately appealable under § 16(a)").

agreements." *Id.* Ironically, it was the Fifth Circuit, in *Beiser* v. *Weyler*, *supra*, that most clearly explained the dangers of that approach, before that court's abrupt reverse of course in *Dahiya*, *supra*. As noted above, the court in *Beiser* adopted a "low bar" under which Section 205 removal jurisdiction exists in "just about any suit" in which a defendant invokes an arbitration clause, "[a]s long as the defendant's assertion is not completely absurd or impossible." *Beiser*, 284 F.3d at 669.

As the *Beiser* court explained—consistent with this Court's later holding in *Arthur Andersen*, 129 S. Ct. at 1400—the contrary view of "conflating jurisdiction and the merits" would "deprive defendants of an opportunity to appeal in a significant class of cases in which the district court concludes that the arbitration clause under the Convention does not in fact provide a defense." *Id.* at 672. "[D]enying defendants appellate review over the refusal to enforce an arbitration clause under the Convention would be in tension with the solicitude with which federal law generally treats arbitration" and would have "irrational consequences" by allowing state judges throughout the nation to have the final word on whether a dispute is arbitrable pursuant to an international treaty. *Id.* at 673-674.[8]

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[8] *See Restoration Pres. Masonry*, 325 F.3d at 59 (*Beiser* conflicted with Eighth Circuit by "criticizing conflation of jurisdictional and merits inquiries in remanding arbitration cases 'into a single step,' and arguing that the consequences of such a conflation are 'both irrational and inconsistent with * * * precedents' because of the importance of international comity, the goal of development of a uniform body of law regarding the Convention, the international business community's need for predictability, and the general federal policy of solicitude toward arbitration").

The Fifth Circuit, however, abruptly retreated from these principles in *Dahiya*, 371 F.3d at 211 & n.5, placing it in conflict with this Court's precedents and those of other circuits. As in this case, even where it is determined that removal jurisdiction exists under Section 205 because a claim "relates to" an arbitration agreement covered by the Convention, a district court's merits-based determination of non-arbitrability will divest both district court *and* appellate jurisdiction. These results are exactly the untenable ones recognized in *Beiser*—the absence of any uniform, federal body of law carrying out an international treaty and the nullification of the strong federal policy favoring arbitration.

This precedent also permits courts, and parties, to manipulate appellate jurisdiction, in contravention of this Court's settled law. *Whitmore* v. *Arkansas*, 495 U.S. 149, 155-56 (1990) ("[a] federal court is powerless to create its own jurisdiction"). For example, in *Palmer Ventures LLC* v. *Deutsche Bank AG*, 254 Fed. App'x 426 (5th Cir. 2007), the district court, much like the court in this case, initially denied a motion to remand a case removed under Section 205 "with the caveat that a closer look * * * might ultimately result in a remand for lack of subject matter jurisdiction." *Id.* at 428-29. The court then denied a motion to compel arbitration, finding no subject matter jurisdiction under the Convention. But instead of issuing an immediate remand, the court gave the party 20 days to assert another basis for federal jurisdiction. *Id.* at 429. Rather than do so, the defendant filed an immediate notice of appeal to the Fifth Circuit pursuant to Section 16(a)(1)(C). The Fifth Circuit took jurisdiction over the appeal and stayed further action in the trial court. *Id.*

In this case, however, the District Court remanded the case at the same time it rejected the Underwriters' motion to compel arbitration, and the Fifth Circuit held that this fortuitous timing precluded appellate jurisdiction. Had the court denied the motion to compel *before* issuing a remand, the Underwriters could have ensured appellate jurisdiction merely by immediately appealing the denial of the motion to compel under Section 16(a)(1)(C).

As evidenced by the decisions of other courts recognizing that determinations of non-arbitrability do not divest jurisdiction over cases removed under the Convention, there is no logical or jurisprudential rationale for allowing appeals of such decisions whenever they precede remand orders, but denying appeals of the same rulings when the District Court elects to issue a simultaneous remand. Congress expressly granted a right of appeal in Section 16(a)(1), in light of the important federal policies favoring arbitration under the Convention. The Fifth Circuit's denial of that right conflicts with the precedents of this Court and other circuits. The Court's review is warranted to resolve those conflicts, and ensure that the right to appeal a denial of arbitration is uniform and predictable for foreign parties seeking to enforce commercial arbitration agreements under the Convention in U.S. courts.

## II. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

This case also involves a question of national importance because the treaty obligation of the United States to provide predictable and uniform rights to enforce arbitration agreements under the Convention is thwarted when courts deny the appellate review granted by Section 16(a)(1) of the FAA.

In the FAA, Congress intended to reverse judicial enmity to arbitration. *See Gilmer* v. *Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). "Section 16(a) serves that end by ensuring that district court orders hostile to arbitration agreements can be immediately appealed." *Conrad*, 585 F.3d 1381. Congress could not have made the FAA's appeal right more plain: "[a]n appeal may be taken from an order * * * denying an application under section 206 of this title to compel arbitration." 9 U.S.C. § 16(a)(1)(C). This Court's review is needed to ensure that the lower courts fulfill this nation's treaty obligations under the Convention.

The Court has long recognized the strong federal policy favoring the effective and efficient resolution of disputes through private arbitration. *See Mitsubishi Motors Corp.* v. *Solar Chrysler-Plymouth, Inc.*, 476 U.S. 614, 626 (1985); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The Convention further implicates "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes." *Mitsubishi*, 473 U.S. at 629. These requirements persist "even assuming that a contrary result would be forthcoming in a domestic context." *Id.* By enabling the Convention's treaty obligations in Chapter 2 of the FAA, Congress made the Convention the "highest law of the land." *Sedco*, 767 F.2d at 1145. As such, "the Convention must be enforced according to its terms over all prior inconsistent rules of law." *Id.*; *accord Bautista* v. *Star Cruises*, 396 F.3d 1289, 1297 (11th Cir. 2005). That includes Section 1447(d).

Even before Section 16's enactment, this Court and other courts employed judicially-made equitable rules, such as the collateral order doctrine, to ensure the appealability of orders preventing arbitration because non-appealability would frustrate "Congress' clear intent, in the [FAA], to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22. A denial of motion to compel arbitration under the Convention was also held appealable as a mandatory injunction under 28 U.S.C. § 1292(a)(1). *Sedco,* 767 F.2d at 1149. Indeed, in *Sedco*, the Convention was found to abrogate a longstanding rule of nonappealability of stays in admiralty law that otherwise would have barred the appeal of an order refusing to enforce an arbitration clause. *Id.* This bar was overridden "to carry out the important congressional policy of insuring that arbitration contracts are enforced in the courts pursuant to the Convention," as well as "to prevent the United States from violating its Treaty obligations with 65 nations." *Id.*

As an exercise of Congress's treaty power and as federal law, "[t]he Convention must be enforced according to its terms over all prior inconsistent rules of law." *Sedco,* 767 F.2d at 1145. The enactment of Section 16 only reinforces that duty, since Congress has now expressly commanded that appellate courts accept jurisdiction over orders denying arbitration under the Convention.

The Convention's goal was "to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced." *Scherk*, 417 U.S. at 520 n.15. These obligations are reciprocal: to gain rights under the Convention, "Congress had to

guarantee enforcement of arbitral contracts and awards made pursuant to the Convention in United States courts." *McDermott* v *Lloyd's Underwriters of London*, 944 F.2d 1199, 1207 (5th Cir. 1991). *See* Convention, art. XIV, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38; S. Rep. No. 91-702, at 3 (1970). As international trade has expanded in recent decades, "so too has the use of international arbitration to resolve disputes arising in the course of that trade." *Mitsubishi*, 473 U.S. at 638. A contractual provision "specifying in advance the forum in which disputes shall be litigated and the law to be applied is * * * an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction," and "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Scherk*, 417 U.S. at 516-517.

Delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced "should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." *Id.* at 520 n.15 (citation omitted). The FAA, which incorporates the Convention, "demonstrates the firm commitment of the Congress to the elimination of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international commercial context." *McCreary Tire & Rubber Co.* v. *Ceat*, 501 F.2d 1032, 1037 (3d Cir. 1974); *cf. Mitsubishi*, 473

U.S. at 625 n.14 (FAA was "designed to overcome an anachronistic judicial hostility to agreements to arbitrate").

The Fifth Circuit, and other courts that allow the general language of Section 1447(d) to defeat the specific conferral of jurisdiction in Section 16(a)(1), create just the kind of unpredictability and parochialism that the Convention sought to eliminate. As this Court has stated, "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Id.* The Fifth Circuit, and other courts following its approach, cede to such parochialism when they fail to abide by Congress's specific intent to provide federal appellate jurisdiction over all decisions declining to recognize rights to arbitration under the Convention.

Uniform federal appellate review ensures that the law of arbitrability furthers the federal policy favoring arbitration over litigation. "[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute," which requires applying "*federal* substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA]." *Mitsubishi*, 476 U.S. at 626 (emphasis added). Under that law, "questions of arbitrability

must be addressed with a healthy regard for the federal policy favoring arbitration." *Id.* at 24-25. [9]

As this case demonstrates, the Fifth Circuit's jurisprudence permits district courts to deny arbitration under the Convention exclusively on *state* contract law grounds with no federal appellate review, thus leaving such cases entirely in the hands of the state courts' interpretations of their own contract law. This result puts the Convention's enforceability into the hands of 50 state supreme courts, rather than the federal circuits. Because "disunity is directly proportional to the number of authorities speaking on any subject * * * federal-district-court Convention decisions are appealable of right to a court of appeals, ensuring uniformity of federal decisions at least on a multi-state basis." *McDermott*, 944 F.2d at 1212. The Fifth Circuit's view destroys this uniformity, undermining the United States' obligations under the Convention.

This result also incentivizes litigation gamesmanship and parochialism. *See Scherk*, 417 U.S. at 516-517 ("parochial refusal by the courts of one country to enforce an international arbitration agreement * * * invite[s] unseemly and mutually destructive jockeying by the parties"). A plaintiff can choose the state forum, the state law that will apply,

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[9] *See Trippe Mfg. Co.* v. *Niles Audio Corp.*, 401 F.3d 529, 532 (3rd Cir. 2005) (presumption in favor of arbitration applies "[w]hen determining both the existence and the scope of an arbitration agreement"); *Smith/Enron Cogeneration Ltd. P'ship* v. *Smith Cogeneration Int'l. Inc.*, 198 F.3d 88, 96 (2d Cir. 1999) ("When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable.").

and even the district court to which removal is anticipated. Here, for example, Pioneer chose the Louisiana forum; the agreements were interpreted under state law; and the case was remanded to a trial court in Baton Rouge, all without *any* federal appellate review of the decision. This favors the party that seeks to litigate and resist arbitration, and encourages forum-shopping to exploit the possibility of evading federal review, exactly the opposite of what Congress and the Convention's signatories intended.

This case exemplifies the gamesmanship inherent in the Fifth Circuit's rules of appealability. The District Court initially determined that it had jurisdiction under the Convention. App. 22a. Suddenly, after months of inaction, it remanded the case based on its construction of the parties' agreements under state contract law, providing no prior opportunity to note an appeal under Section 16(a)(1)(C). App. 38a. If the District Court had denied the Underwriters' motion to compel for the same reason (lack of a valid agreement) *without* remanding (as courts in other circuits would have done), it is indisputable that Section 16 would provide an immediate right to an interlocutory appeal. Nothing in the FAA authorizes district courts to hold the keys to the right to appeal.

To interpret Section 1447(d) to foreclose appeal of Convention cases, despite the FAA's plain provisions, "frustrate[s] the intention of Congress as reflected by the FAA and the [Convention] to give foreign parties the right to choose arbitration as a form of dispute resolution designed to save the parties time, money, and effort by substituting for the litigation process the advantages of speed, simplicity, and economy

associated with arbitration." *Dahiya* v. *Talmidge Int'l Ltd.*, 380 F.3d 218 (5th Cir. 2004) (DeMoss, J., dissenting from denial of rehearing en banc). "If the provisions of § 1447(d) will always trump the provisions of 9 U.S.C. § 16, then the Convention will be unenforceable" in states where Section 1447(d) determines appealability of Convention cases, and Congress's "elaborate efforts in Title 9 to give parties the right to choose arbitration in place of litigation can now be frustrated by the age-old controversy as to whether litigation was going to occur in the state courts or the federal courts." *Id.* The Court should grant review to unify to the law, and to quell the lower courts' subversion of federal treaty obligations.

## III. ALTERNATIVELY, THE COURT SHOULD VACATE THE DECISION BELOW, AND REMAND TO THE FIFTH CIRCUIT FOR RECONSIDERATION SUPPORTED BY AN OPINION.

As explained above, certiorari is warranted in this case because the Fifth Circuit's jurisprudence—reflected in its prior decision in *Dahiya*—conflicts with this Court's precedents and the holdings of other circuits. But at a bare minimum, the Court should require the Fifth Circuit to state its reasoning for any decision in this case to deny the appellate right of review mandated in Section 16(a). This is not a case where a court of appeals has summarily affirmed the reasoning of a decision reached by a district court. Rather, the Fifth Circuit was the first—and only—lower court that could have opined on the question of appellate jurisdiction, and that court summarily dismissed the Underwriters' appeal without any opinion or even citation of authority. Accordingly, even if this Court were not inclined to

grant plenary review at this time, it should grant the petition, vacate the Fifth Circuit's judgment, and remand this case ("GVR") for that court to state a rationale for its actions.

In other cases, the Court has addressed the lack of an opinion on a matter of great importance by granting certiorari, vacating the opinion below, and remanding for an opinion from the lower court. For example, in *Taylor* v. *McKeithen*, 407 U.S. 191, 194 (1972), the Court issued a GVR in a civil rights case "[b]ecause this record does not fully inform us of the precise nature of the litigation and because we have not had the benefit of the insight of the Court of Appeals." Similarly, in *Northcross* v. *Memphis Bd. of Ed.*, 412 U.S. 427, 428-29 (1973), the Court issued a GVR where the decision below "was without stated reasons." And more recently, in *Youngblood* v. *West Virginia*, 547 U.S. 867, 870 (2006), where the majority on the state supreme court did not address the constitutionality of a search, the Court issued a GVR, stating that "it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia" on the issue.

A GVR is likewise warranted in this case. Indeed, neither the litigants nor this Court have the benefit of *any* opinion from *any* lower court on the dispositive question of appellate jurisdiction. The District Court ruled on the issue of arbitrability, but it was not asked to, nor could it have, opined on whether 28 U.S.C. § 1447(d) barred appeal of its order. That question was faced for the first time by the Fifth Circuit, in the form of Pioneer's motion to dismiss. That court, however, summarily granted the motion without setting the matter for further briefing or argument, without issuing an opinion,

and without providing even a citation of authority for its decision. App 1a.

As explained above, the Court can and should review the question presented in light of the conflict between the precedents of the Fifth Circuit and those of this Court and other circuits. But at a bare minimum, the Court should require the Fifth Circuit to explain its actions. To be sure, courts of appeals routinely issue summary affirmances of district court decisions where the trial court's reasoning (whether oral or written) is correct, and in those circumstances there is no need for a court of appeals to duplicate the analysis of the trial court. Here, however, there was not—and could not have been—any decision or reasoning by the District Court on the question of appellate jurisdiction. The Fifth Circuit was the sole arbiter on that question and it abdicated any responsibility to explain its actions.

Given the national and international importance of the issue, if the Court is not inclined to grant certiorari in the first instance it should, at a minimum, require the Fifth Circuit to reconsider the case and provide a rationale for its decision. Pioneer should not be able to evade review of the decision granting its motion to dismiss merely because the court of appeals elected not to explain that important decision.

## CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed. In the alternative, the petition should be granted, the judgment below should be vacated, and the case should be remanded to the court of appeals for further consideration supported by an opinion.

Respectfully submitted,

J. CLIFTON HALL, III
CANDACE A. OURSO
STEPHANIE R. TIPPITT
WESTMORELAND HALL, P.C.
2800 Post Oak Blvd.
Williams Tower
64th Floor
Houston, Texas 77056
(713) 871-9000

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0210

* Counsel of Record

*Counsel for Petitioners*

# APPENDIX

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**APPENDIX A**

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

U.S. COURT OF APPEALS
FILED
DEC 17 2009
CHARLES R. FULBRUGE III
CLERK

No. 09-31031

PIONEER NATURAL RESOURCES USA, INC.; PIONEER NATURAL RESOURCES COMPANY,

Plaintiffs - Appellees

vs.

ZURICH AMERICAN INSURANCE CO; MUTUAL MARINE OFFICE INC, on behalf of New York Marine & General Insurance COMPANY; XL INSURANCE COMPANY, Through XL Marine and Offshore Energy; ARCH INSURANCE COMPANY; LIBERTY MUTUAL INSURANCE COMPANY; CERTAIN INTERESTED UNDERWRITERS AT LLOYDS LONDON, Watkins, Syn.# ; Hiscox, Syn.#0033; Wellington Syn.#2020; Navigators; Aspen Re; Aegis, Syn. #1225; O'Farrell, Sync #1036; Kiln,Syn.#0510; HCC; Brit, Syn.#2987; St. Paul Syn. #5000; SL, Syn #120; AMERICAN OFFSHORE INSURANCE SYNDICATE,

Defendants – Appellants

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

Before HIGGINBOTHAM, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellees' motion to dismiss the appeal for lack of subject matter jurisdiction is granted

[Judges' initials]

## APPENDIX B

## UNITED STATES DISTRICT COURT
## MIDDLE DISTRICT OF LOUISIANA

| | |
|---|---|
| **PIONEER NATURAL RESOURCES, U.S.A., INC., ET AL.** | **CIVIL ACTION** |
| | **NUMBER 08-227-JVP-DLD** |
| **VERSUS** | |
| **ZURICH AMERICAN INSURANCE CO., ET AL** | |

### MAGISTRATE JUDGE'S REPORT

This matter is before the Court on a motion to remand and for costs (rec. doc. 5) filed by plaintiffs, Pioneer Natural Resources U.S.A., Inc. and Pioneer Natural Resources Company. The motion is opposed by the Underwriter defendants (rec. doc. 21).[1]

**Background**

Plaintiffs are the owners of the East Cameron 322 platform and associated wells and well heads (EC

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[1] Defendants include the following Certain Underwriters at Lloyd's London and Certain London Market and Domestic Insurance Companies: Syndicate 457, Syndicate 33; Syndicate 2020; Syndicate 1225; Syndicate 5000; Syndicate 1036; Syndicate 1209; Syndicate 510; Syndicate 2987; Navigators Insurance Company; Aspen Insurance UK Limited; Houston Casualty Company; Commonwealth Insurance Company; Gard Marine & Energy Ltd; Zurich American Insurance Company; Mutual Marine Office, Inc. on behalf of N.Y. Marine & Gen. Ins. Co.; Arch Insurance Company; Liberty Mutual Insurance Company; American Offshore Insurance Syndicate; XL Specialty Insurance Company (through XL Marine & Offshore Energy) (rec. doc. 1-3).

322) located in the Gulf of Mexico, and the defendants are various companies and syndicates subscribing to a Package Insurance Policy CR-5591(the Package Policy) which covered EC 322 for the policy period of 15 June 2005 - 2006 (rec. doc. 1-6, Exhibit C). Plaintiffs allege in their original petition that they sustained damages of $50 million, excluding loss of income, related to the destruction of EC 322 by Hurricane Rita on September 23, 2005.[2]

Plaintiffs originally brought suit in state court against defendants under the Package Policy on August 8, 2007, for payment of insurance proceeds, breach of contract, detrimental reliance, and breach of duty of good faith and fair dealing.[3] On September 5, 2007, defendants filed a competing declaratory relief action in Texas asserting that Texas courts had exclusive jurisdiction over the matter based on a forum selection clause in the slip (rec. doc. 6, Exhibit

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[2] Plaintiffs allege in their memorandum in support of their motion to remand that they "incur and continue to incur damages projected to exceed $185 million related to the destruction of EC322 and the damage to the wells" (rec. doc. 1-8).

[3] Plaintiffs explain in their memorandum in support of motion to remand that in order "to avoid prescription or venue issues, on August 8, 2007, Pioneer filed four identical lawsuits in Louisiana state courts - Orleans Parish, Cameron Parish, Lafayette Parish, and East Baton Rouge Parish. Pioneer subsequently dismissed all except the Baton Rouge action as Underwriters agreed that all matters be allowed to proceed in Baton Rouge with Underwriters' reservations of their rights to assert forum non conveniens in Baton Rouge based on the Texas choice of law and jurisdiction provision based on the "slip" (rec. doc. 15, p. 9).

B).[4] On February 8, 2008, plaintiffs filed an amended petition for damages against defendants and specifically sought recovery under Section Three's excess coverage under the Package Policy (rec. doc. 1-9). On April 18, 2008, the Underwriter defendants removed this matter pursuant to the Federal Arbitration Act, 9 U.S.C. §§1 and 2, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§201-205, and 28 U.S.C. §1441, et. seq.

Defendants explain in their removal petition that plaintiffs allege coverage under Section Three of the Package Policy in the amended petition, and Section Three's "following form" provision incorporates the mandatory arbitration provision of the underlying AEGIS policy. The existence of a mandatory arbitration agreement which is not entirely between citizens of the United States supports removal under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 9 U.S.C. §201, et. seq. Defendants therefore seek to invoke the Court's federal question jurisdiction pursuant to 28 U.S.C. §1331. Plaintiffs filed a motion to remand this matter to state court and for costs on May 5, 2008. Defendants have opposed the motion, and the matter is now before the Court for review.

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[4] The "slip" is the pre-policy/contract document that is used to place insurance in the London market. The Policy is the binding document that gives expansion to the terms contained in the "slip" (rec. doc. 15). The "slip" provides that "[t]he proper and exclusive law of this insurance shall be Texas law. Any dispute arising under or in connection with it shall be subject to the exclusive jurisdiction of the Texas courts." (rec. doc. 6, Exhibit B). This provision did not make it into the negotiated terms of the Package Policy.

The Insurance Policies

The Package Policy underwritten by defendant underwriters is divided into sections covering various types of coverage related to risks associated with an offshore platform. The Package Policy also covers different layers of coverage and is composed of both primary and excess layers. Of particular interest to the instant motion are sections one and three of the Package Policy. Section One provides for $5 million in coverage for physical damage to the platform, including a $5 million primary layer for Removal of Wreckage/Debris. Excess coverage over Section One is composed of two layers. The first layer of excess coverage is through Associated Electric & Gas Insurance Services Limited (AEGIS) in the amount of $35 million over the underlying $5 million of Section One of the Package Policy. The Package Policy comes into play again above the AEGIS policy. This second excess layer is under Section Three of the Package Policy and is in the amount of $65 million over the underlying $40 million ($5 million of Section One of the Package Policy and $35 million excess of $5 million under the AEGIS policy).[5]

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[5] There are other policies relevant to the claimed losses, but those policies are not relevant for purposes of the pending motion. Defendants, Mutual Marine Office, Navigators Management UK, Aspen Insurance, ACE European Group, and Lloyd's Syndicates 1036, 0457, 1221, 0033, 3000, 1225, 0609, 1183, and 1987 subscribe to Excess Liability Policy CR-7886, which was issued to Pioneer. Defendants, XL Specialty Insurance Company, ACE Insurance Company of Texas, Navigators Insurance Company, Houston Casualty Company, and Lloyd's Syndicate 1036 subscribe to Excess Liability Policy CR-5640, which was issued to Pioneer.

The "INSURING AGREEMENT" of Section Three of the Package Policy provides that Section Three will be governed by the terms and conditions of the underlying AEGIS policy:

> Subject to the Limit and Excess specified in the Declarations and any paramount exclusions contained in the General Conditions, this Section Three shall follow the terms and conditions maintained by the Named Insured with Associated Electric & Gas Insurance Services Limited ("AEGIS") — policy #X0602A1A05 — the "Underlying Insurance", including any separate or extract policy issued by or caused to be issued by AEGIS from the foregoing.

(rec. doc. 1-6, Notice of Removal, Exhibit "C").

There is no dispute that the AEGIS policy provides for mandatory arbitration, and, indeed, Pioneer and AEGIS are now in arbitration (rec. doc. no. 15). There are, however, many disputes over whether the mandatory arbitration provision of the AEGIS policy applies to Section Three of the Package Policy.

**Law and Discussion**

***Standard on Removal and Remand***

Remand is proper if at any time the court lacks subject matter jurisdiction. See 28 U.S.C. §1447(c). The removing party bears the burden of showing both that federal jurisdiction exists and, if challenged, that the removal was procedurally proper. See, e.g., *Manguno* v. *Prudential Property and Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). The removal statute, 28 U.S.C. §1441, is strictly construed and any doubt as to the propriety of removal should be resolved in favor of remand.

*Gasch* v. *Hartford Acc. & Indem. Co.*, 491 F.3d 278 (5th Cir. 2007); *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 108-109, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941). However, "the general rule of construing removal statutes strictly against removal 'cannot apply to Convention Act cases because in these instances, Congress created special removal rights to channel cases into federal court.'" *Acosta* v. *Master Maint. & Constr. Inc.*, 452 F.3d 373, 377 (5th Cir. 2006 ) (quoting *McDermott Int'l, Inc.* v. *Lloyds Underwriters of London*, 944 F.2d 1100, 1213 (5th Cir. 1991). Removal under the Convention is an exception to the general rules that a federal question ordinarily must appear on the face of a properly pleaded complaint, and an anticipated or actual federal defense generally does not qualify a case for removal. *Jefferson County, Ala.* v. *Acker*, 527 U.S. 423, 431, 119 S.Ct. 2069, 144 L.Ed.2d 408 (1999). Under the Convention, the grounds for removal may appear in the petition, but may also be shown in the petition for removal. See 9 U.S.C. §205; *Beiser* v. *Weyler*, 284 F.3d 665, 671 (5th Cir. 2002).

***Substantive Law***

The Federal Arbitration Act (FAA) governs the enforcement, validity, and interpretation of arbitration clauses in commercial contracts both in state and federal courts. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941-42, 74 L.Ed.2d 765 (1983). Chapter 2 of the FAA, 9 U.S.C. §§201-208, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention), controls arbitration disputes in the international context. In general, the FAA creates a strong presumption in favor of arbitration, especially

in international commercial agreements. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-40, 105 S.Ct. 3346, 3359-61, 87 L.Ed.2d 444 (1985).

Pursuant to Section 203 of the Convention, an action or proceeding falling under the Convention shall be deemed to arise under the laws and treatise of the United States; thus, the district courts of the United States are deemed to have original jurisdiction of such actions, regardless of the amount in controversy. See 9 U.S.C. §203. Section 205 of the Convention allows defendants to remove a state court action at any time prior to trial when the subject matter of the lawsuit "relates to an arbitration agreement or award falling under the Convention." 9 U.S.C. §205.[6]

A matter "falls under the Convention" if it (1) involves an agreement in writing to arbitrate a dispute; (2) arises out of a commercial legal relationship; (3) provides for arbitration in the territory of a Convention signatory; and (4) involves a least one non-American citizen or concerns

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[6] Where the subject matter of an action or proceeding pending in a State court *relates to an arbitration agreement or award falling under the Convention*, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed. See 9 U.S.C. §205 (emphasis added).

property located abroad, involves performance or enforcement abroad, or has a reasonable relationship with a foreign state. See 9 U.S.C. §202; *Sedco, Inc.* v. *Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1144-1145 (5th Cir. 1985). The determination of whether the agreement "fall[s] under the Convention" will ordinarily prove quick and easy, without requiring too much merits-like investigation by the district court. *Beiser* v. *Weyler*, 284 F.3d 665, 672, FN7 (5th Cir. 2002).

In analyzing whether removal jurisdiction existed in *Beiser* v. *Weyler*, even though the arbitration agreement was between a defendant and a non-signatory, the Fifth Circuit focused on meaning of the phrase "relates to" in 9 U.S.C. §205. *Beiser*, 284 F.3d at 666, FN2. The Fifth Circuit broadly interpreted the term "relates to" and explained that "whenever an arbitration agreement falling under the Convention could conceivably affect the outcome of the plaintiff's case, the agreement "relates to" to the plaintiff's suit." *Beiser*, 284 F.3d, at 669. The *Beiser* court also explained that because Section 205 allows district courts to assess their jurisdiction from the pleadings alone, courts must be cautious not to "conflate the jurisdictional and merits inquiries into a single step." *Beiser*, 284 F.3d, 670.[7] The definition of "relates to" adopted by the *Beiser* court allows a determination of jurisdiction from the petition for removal itself, and keeps the jurisdictional and merits inquiries separate. Id., at 671. Thus, "absent the rare frivolous petition for removal, as long as the

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[7] Whether a federal court has jurisdiction to decide an issue is a different question from how to decide that issue correctly. *Beiser*, 284 F.3d, at 670; see also *Ostrowiecki* v. *Aggressor Fleet, Ltd.*, 2007 WL 4365442 (E.D. 2007).

defendant claims in its petition that an arbitration clause provides a defense, the district court will have jurisdiction to decide the merits of that claim." Id.

The *Beiser* court stressed the importance of a parties' right to appeal a decision on a motion to stay or compel arbitration and explained that delving too deeply into the merits on a jurisdictional inquiry and then remanding the case for lack of subject matter jurisdiction would deprive defendants of an opportunity to appeal issues regarding whether the matter should be stayed or compelled to arbitration. *Id.* see also *Dahiya* v. *Talmidge International, Ltd.*, 371 F.3d 207 (5th Cir. 2004); *Sedco, Inc.*, 767 F.2d at 1149; *McDermott International, Inc.* v. *Lloyds Underwriters of London*, 944 F.2d 1199, 1211-12 (5th Cir. 1991). Conscious of these issues, the Court is cautious not to delve into the merits and focuses on whether the allegations made in the amended petition or notice of removal are sufficient to establish jurisdiction.

**Arguments of the Parties**

The plaintiffs and defendants have advanced numerous arguments in support of their respective positions; however, both parties have lost sight of the pertinent issue in a motion to remand – which is simply whether the Court has subject matter jurisdiction based on the face of the pleadings and removal documents. Issues of whether the terms of the underlying AEGIS policy will be incorporated into the Package Policy, whether the parties will be compelled to arbitration based on contract interpretation, or whether a party has waived its right to arbitrate are based on the merits, are inapplicable to the decision on the motion to remand,

and are more appropriate for presentation in a subsequent motion.

Plaintiffs, for example, argue that this court does not have removal jurisdiction because the Convention does not apply. Plaintiffs argue that they did not agree that the terms of the underlying AEGIS policy would be incorporated into the Package Policy and require arbitration of their Section Three claims. Plaintiffs further argue that the Convention does not apply because the arbitration provision does not provide for arbitration in the territory of a Convention signatory. Both sides have submitted deposition testimony in support of their competing claims. Plaintiffs also contend that defendants have waived their right to arbitrate by filing the declaratory judgment action in Texas state court and have waived their right to remove by conducting discovery and vigorously defending the Baton Rouge state court action. Finally, plaintiffs suggest that if the Court finds that the Section Three claims are subject to arbitration, it should remand the Section Two claims because they are not related to the arbitration agreement.

Defendants respond that removal was proper because the arbitration agreement "falls under" the Convention and could conceivably affect the disposition of the case. Defendants state that plaintiffs consented to the agreement to arbitrate the dispute by drafting the terms of the Package Policy, which incorporates the arbitration provision in the underlying AEGIS policy. Defendants continue that the agreement to arbitrate arises out of a commercial legal relationship, arbitration can be compelled in this district, and the arbitration agreement is between citizens or subjects of one or more foreign

nations. Defendants deny that they explicitly waived their right to remove. Finally, defendants believe that plaintiffs' claims under Section Two of the Policy should remain with their Section Three claims because they "relate to" the arbitration provision covering plaintiffs' Section Three claims, and their inclusion would prevent double recovery of damages.

**Analysis**

In order for the Court to have subject matter jurisdiction, plaintiffs' claims must "relate to" an agreement "falling under the Convention." 9 U.S.C. §205. As the *Beiser* court explained, in order to make that determination, the court must determine first whether the arbitration provision "falls under the Convention." If the agreement falls under the Convention, then the second step is to determine whether the arbitration clause "relates to" the cause of action.

Does the arbitration agreement "fall under" the Convention?

An arbitration provision "falls under" the Convention if it: (1) involves an agreement in writing to arbitrate a dispute; (2) arises out of a commercial legal relationship; (3) provides for arbitration in the territory of a Convention signatory; and (4) involves at least one non-American citizen or concerns property located abroad, involves performance or enforcement abroad or has a reasonable relationship with a foreign state. 9 U.S.C. §202.

Defendants' notice of removal alleges that there is an agreement to arbitrate the dispute in this matter. Specifically, the notice of removal states that plaintiffs allege in their amended petition that defendants breached Section Three of the Package

Policy, which through the "INSURING AGREEMENT" language or "following form" provision, invokes the AEGIS policy's mandatory arbitration provision (rec. doc. 1-2).[8] There is no doubt the underlying AEGIS policy contains a mandatory arbitration agreement, as plaintiffs have already invoked the provision to resolve their claim for first tier excess removal of debris (rec. docs. 15 and 21, p. 9). Although plaintiffs spend much time advancing arguments based on contract interpretation and intent of the parties that the underlying AEGIS arbitration provision cannot be incorporated into the Package Policy to cover their Section Three claims, this is not the issue before the Court on the motion to remand. The questions of whether the arbitration provision in the AEGIS policy can be read into the Package Policy through the following form provision or whether a particular party can be compelled to arbitrate a particular issue are merits-based inquiries, separate from the Court's determination of whether it has jurisdiction to decide

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[8] Section Three, Article I of the Package Policy provides that "this Section Three shall follow the terms and conditions maintained by the Named Insured with Associated Electric & Gas Insurance Services Limited ("AEGIS") - policy #X0602A1A05..." (rec. doc. 102, p. 3). Pursuant to Section IV, Condition R, of the AEGIS policy, any controversy or dispute arising out of or relating to the Policy, or the alleged breach, termination or validity thereof, shall be resolved by the procedures specified in Conditions R, consisting of (1) good faith negotiations between executions with authority, toward resolution of any controversy or dispute arising out of the Policy, including exchange of position papers and meetings; (2) mediation with a neutral third party; and (3) if the controversy or dispute cannot be resolve via negation or mediation, it shall be subject to binding arbitration pursuant to, among other things, the U.S. Arbitration Act, 9 U.S.C. §1, et. seq.

the case either way. *Ostrowiecki*, 2007 WL 4365442, FN36; *Beiser,* 284 F.3d 670-671. There clearly is an arbitration agreement which arises out of a commercial relationship. And there clearly is a reasonable allegation that this arbitration agreement applies to Section Three of the Package Policy through the following form provision. Whether or not the plaintiffs ultimately will be bound by that agreement is a dispute for another day, but the first two requirements for jurisdictional purposes are met.

The third requirement is that the agreement provides for arbitration in the territory of a Convention signatory. The parties agree that the arbitration clause in the underlying AEGIS policy does not provide for a specific venue for arbitration. Rather, the provision states that "[t]he arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. §1, et seq. ..." (rec. doc. 1-7, Exhibit D, p.19). If the Court were to find at a later date that the parties were bound by the agreement and that the Section Three claims were subject to mandatory arbitration pursuant to the terms of the underlying AEGIS policy, it would not be helpless to enforce the arbitration agreement. See *Jain* v. *de Méré*, 51 F.3d 686 (7th Cir. 1995). The Court has the power to compel arbitration in its own district by proceeding under 9 U.S.C. §4, which provides in pertinent part that "... [t]he hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. ..." Id. at. 690, *citing* 9 U.S.C. §4. Thus the third requirement is met.

The fourth requirement is that the agreement involves a least one non-American citizen or concerns property located abroad, involves performance or

enforcement abroad, or has a reasonable relationship with a foreign state. Defendants allege that several of the defendant Underwriters are citizens or subjects of one or more foreign nations; therefore, the Package Policy does not arise out of a relationship which is "entirely between citizens of the United States," and the Package Policy has a reasonable relation with one or more foreign states (rec. doc. 1-2). Plaintiffs are Delaware corporations, which are domiciled in and have their principal places of business in Texas (rec. doc. 1-8). Subscribers to the Package Policy include (1) nine Lloyd's syndicates[9]; (2) several London Market Insurance companies[10]; (3) Gard Marine & Energy Ltd., a Norwegian insurance company; and (4) Commonwealth Insurance Company, a Canadian Insurance Company (rec. doc. 21, Exhibits 3-4).

Based on the allegations in defendants' notice of removal, defendants have alleged facts sufficient to support a finding of that the alleged arbitration agreement "falls under the Convention."

Does the litigation "relate to" the arbitration clause?

Having found that the arbitration provision "falls under" the Convention, the Court must now determine whether the litigation "relates to" the arbitration clause for purposes of removal. Plaintiffs'

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[9] Syndicate numbers 457, 33, 2020, 1225, 5000, 1036, 1209, 510, and 1987 (rec. doc. 21, Exhibit 3). Syndicate 457 is a citizen of the United Kingdom. Id, Exhibit 4. The United Kingdom, Norway and Canada are all parties to the Convention. See notes to 9 U.S.C. §201.

[10] Navigators Insurance Company, Aspen Insurance UK Ltd., and Houston Casualty Company.

claims for coverage under Section Three of the policy must be interpreted in connection with Section Three's following form provision that arguably incorporates the mandatory arbitration provision in the AEGIS policy. Under the extremely loose requirements of "relates to" under 9 U.S.C. §205, as laid out by the Fifth Circuit in *Beiser*, the Court finds that the claims under Section Three relate to the arbitration agreement. Based on a subsequent motion by the parties, the Court will be able to make the determination whether claims under Section Three of the Policy should be compelled to arbitration.[11]

Plaintiffs also argue that their claims under Section Two do not "relate to" the arbitration agreement because Section Two involves a permissive, as opposed to mandatory arbitration agreement. Regardless of the merit to that argument, for the time being, the court may exercise supplemental jurisdiction over the Section Two claims. Whether or not these claims will be stayed or compelled to arbitration or ultimately remanded can be decided on another day, once the forum for the Section Three claims has been resolved.

Waiver of Removal

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11 Defendants suggest that the *Beiser* analysis is not necessary for plaintiffs' Section Three claims because the Section Three claims are subject to mandatory arbitration. Defendants' argument presupposes the underlying AEGIS policy is incorporated into the Package Policy via the following form provision and mandates arbitration of plaintiffs' Section Three claims. The Court declines to conduct a merits-based inquiry to make the determination as to whether the agreement to arbitrate will be incorporated on this motion, as it is more appropriate for a subsequent motion to compel arbitration.

Plaintiffs argue that even if there is an arbitration agreement under Section Three, defendants waived their right to remove by seeking "substantive relief in state courts in Baton Rouge and Texas" and engaging in discovery in those proceedings (rec. doc. 15). Plaintiffs' extensive reliance on *Certain Underwriters at Lloyd's* v. *Bristol-Myers Squibb Co.*, 51 F. Supp.2d 756 (E.D. Tex. 1999), is misplaced. The court in *Certain Underwriters at Lloyd's* v. *Bristol-Myers Squibb Co.*, supra, granted the motion to remand based on a finding that the insurers had waived their opportunity to remove under the Convention. This finding came after the insurers had realigned themselves as plaintiffs, filed a claim for recision of the insurance contract based on misrepresentation, and there had been a full trial on the merits on the recision claim. The Fifth Circuit in *McDermott International, Inc.* v. *Lloyds Underwriters of London*, 944 F.2d 1199, 1209-1210 (5th Cir. 1991), held that defendants may contractually waive the removal privilege under Section 205; however, the waiver must be explicit.

Section 205 allows for removal of a state court action "at any time before the trial thereof." Plaintiffs have outlined the time line of legal filings and discovery related to this action; however, it appears that there has not been a trial on the merits in either the Baton Rouge or Texas actions, and the plaintiffs only recently amended their petition to specifically add Section Three claims. Additionally, much of the legal maneuvering by the parties has been over the jurisdictional/forum issues. Thus, there is no evidence at this time that defendants have

explicitly waived their right to removal under Section 205.[12]

**Conclusion and Recommendation**

The agreement to arbitrate was raised in the notice of removal, and if applicable, it conceivably could affect the outcome of the litigation. The Fifth Circuit has clearly instructed the district courts not to delve into the merits of whether the arbitration agreement will be invoked based on a construction of the terms of the insurance contracts, testimony of witnesses, and other information gleaned through discovery during the jurisdictional inquiry. It is the existence of an arbitration agreement which could conceivably affect the outcome of litigation, not the enforceability of the agreement, which is at issue in this motion. Defendants may not ultimately prevail on a subsequent motion to compel arbitration, and they may one day be returned to state court, but that is an issue for another day. For the purposes of this motion to remand, defendants have made the requisite showing to establish that removal under 9 U.S.C. §205 was proper.

The Magistrate Judge finds that the litigation relates to an arbitration agreement that falls under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208, and therefore the matter was properly removed pursuant to 9 U.S.C. § 205. For the reasons stated above, the Magistrate Judge recommends that the plaintiffs'

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12 Matters of procedural arbitrability, such as, *inter alia*, whether the request for arbitration was timely under the arbitration agreement, are for the arbitrator to decide. See *Sedco*, 767 F.2d 1140, 1151, citing, *Commerce Park at DFW Freeport* v. *Mardian Constr. Co.*, 729 F.2d at 339, n.5 (5th Cir. 1984).

motion to remand and for costs (rec. doc. 5), should be **DENIED**.

Signed in Baton Rouge, Louisiana, on January 6, 2009.

_____/Docia L. Dalby/_____

MAGISTRATE JUDGE DOCIA L. DALBY

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF LOUISIANA**

| | |
|---|---|
| **PIONEER NATURAL RESOURCES, U.S.A., INC., ET AL.** | **CIVIL ACTION** |
| | **NUMBER 08-227-JVP-DLD** |

**VERSUS**

**ZURICH AMERICAN INSURANCE CO., ET AL**

**NOTICE**

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the U.S. District Court.

In accordance with 28 U.S.C. §636(b)(1), you have ten days from date of receipt of this notice to file written objections to the proposed findings of fact and conclusions of law set forth in the Magistrate Judge's Report. A failure to object will constitute a waiver of your right to attack the factual findings on appeal.

**ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.**

Signed in Baton Rouge, Louisiana, on January 6, 2009.

/Docia L. Dalby/

MAGISTRATE JUDGE DOCIA L. DALBY

**APPENDIX C**
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PIONEER NATURAL RESOURCES, U.S.A., INC., ET AL.

FILED
U.S. DIST COURT
MIDDLE DISTRICT OF LA
2009 FEB 10 P 4:05
SIGN _____
BY DEPUTY CLERK

VERSUS CIVIL ACTION NO.: 08-227-JVP-DLD

ZURICH AMERICAN INSURANCE CO., ET AL

**RULING ON MOTION FOR MOTION TO REMAND**

The court has carefully considered the petition, the record, the law applicable to this action, and the Report and Recommendation of United States Magistrate Judge Dalby dated January 6, 2009 (doc. 56). Plaintiff has filed an objection and defendant has filed a response to that objection, which merely restate legal argument and do not require *de novo* factual findings under 28 U.S.C. § 636.

The court hereby approves the report and recommendation of the magistrate judge and adopts it as the court's opinion herein.

Accordingly, the motion to remand and for costs (doc. 5) is hereby **DENIED**.

Baton Rouge, Louisiana, February 10th, 2009.

__/James J. Brady, U.S.D.J. for/_____
JOHN V. PARKER
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

**APPENDIX D**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PIONEER NATURAL RESOURCES, U.S.A., INC., ET AL.

VERSUS

ZURICH AMERICAN INSURANCE CO., ET AL

FILED
U.S. DIST COURT
MIDDLE DISTR OF LA
2009 OCT - 7 P 1:48
SIGN _____
BY DEPUTY CLERK

CIVIL ACTION

NO. 08-227-JVP-DLD

## RULING

This matter is before the court on a motion by defendants, Certain Underwriters at Lloyd's London, and Certain London Market and Domestic Insurance Companies ("Underwriters") to compel arbitration of all of plaintiffs' claims, or, in the alternative, to compel arbitration of a portion of the claims and stay others pending resolution of the claims submitted to arbitration (doc. 74).

This matter is also before the court on a joint motion by plaintiffs, Pioneer Natural Resources, U.S.A., Inc. and Pioneer Natural Resources Company (jointly "Pioneer"), to remand a portion of the claims (doc. 81). The motions are opposed. Jurisdiction is alleged under 9 U.S.C.§ 203 and 28 U.S.C. §. 1331. Oral argument was heard on the motions and the matter is now submitted.

## FACTS AND PROCEDURAL HISTORY

At all times pertinent to this action, plaintiffs were owners and operators of offshore platforms, pipelines and other facilities in the Gulf of Mexico, including East Cameron 322 Platform ("EC322") and its associated wells. On September 23, 2005, Hurricane Rita passed over EC322 and caused the platform to collapse. This action arises out of disputes related to the subsequent insurance claims filed by Pioneer.

Pioneer asserts insurance claims under Energy Package Policy No. CR—5591 and EJLPN0205 ("Package Policy"), certain coverage sections of which the Underwriters severally subscribed. The Package Policy, effective June 15, 2005 through June 15, 2006, provides several types of coverage.

Section One of the Package Policy provides insurance coverage for physical damage to the platform, including $5 million coverage for removal of Wreckage and Debris ("R.O.D"). Section Two provides coverage for Control of Well Insurance, Redrilling/Extra Expense, and Seepage and Pollution, Cleanup and Contamination. Section Three of the Package Policy, Excess Liabilities, provides $35 million excess coverage for R.O.D. in a policy issued to Pioneer by Associated Electric & Gas Insurance Services Limited ("AEGIS"). The Third Section also provides a second layer of excess coverage in the amount of $65 million. Section Six provides coverage for loss of production income.

Plaintiffs brought suit against the Underwriters under the Package Policy in the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana on August 8, 2007. Pioneer claimed damages of $50 million, excluding loss of income

related to the destruction of oil platform and alleged breach of contract, detrimental reliance and breach of duty of good faith and fair dealing, as well as a right to payment of insurance proceeds. Defendants, on September 5, 2007 filed a declaratory action in Texas asserting that Texas had exclusive jurisdiction over the matter. On February 8, 2008, plaintiffs filed an amended petition seeking recovery under the excess coverage provided by Section Three of the Package Policy (doc. 1-9). Then, on April 18, 2008, defendants removed this matter pursuant to the Federal Arbitration Act, 9 U.S.C. §§1 and 2, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 9 U.S.C. §§201-205, and 28 U.S.C. §1441, et. seq.

In support of removal, defendants assert that a "following form" provision in Section Three of the Package Policy incorporates a mandatory arbitration provision in the underlying AEGIS policy. Because parties to the agreement are not citizens of the United States, defendants argue that the existence of a mandatory arbitration provision renders the agreement subject to interpretation under the Convention and therefore provides federal question jurisdiction pursuant to 28 U.S.C. §1331.

There is no dispute that the AEGIS policy provides for mandatory arbitration, and Pioneer and AEGIS have engaged in arbitration of the disputes arising under that policy. Pioneer however, disputes the Underwriters' assertion that the rest of the Package Policy is subject to mandatory arbitration.

On May 5, 2008, Pioneer moved for remand asserting that the following form provision of Section Three does not incorporate the mandatory arbitration provision of the AEGIS policy into the

Package Policy and that the Convention is therefore not applicable to the dispute. In denying the May 5, 2008 motion to remand, the court stated:

> Although plaintiffs spend much time advancing arguments based on contract interpretation and intent of the parties that the underlying AEGIS arbitration provision cannot be incorporated into the Package Policy to cover their Section Three claims, this is not the issue before the Court on the motion to remand. The questions of whether the arbitration provision of the AEGIS policy can be read into the Package Policy through the following form provision or whether a particular party can be compelled to arbitrate a particular issue are merits-based inquiries, separate from the court's determination of whether it has jurisdiction to decide the case either way.

(Doc. 56, pp 10-11).

The court then found that "defendants have alleged facts sufficient to support a finding that the alleged arbitration agreement "falls under the Convention," but the court also noted that "[w]hether or not these claims will be stayed or compelled to arbitration or ultimately remanded can be decided on another day, once the forum for the Section Three claims has been resolved." (Doc. 56, pp. 11, 12).

Shortly thereafter, the court dismissed a motion to stay pending arbitration specifically stating that the dismissal was without prejudice to defendants to file a motion to compel arbitration and/or stay litigation in order to squarely present the pertinent issues, along with any evidentiary materials necessary for the motion" (doc. 62). Accordingly, defendants filed

the current Motion to Compel Arbitration and/or Motion to Stay Litigation (doc. 74), and plaintiffs filed the current motion to Remand Section Two Claims (doc. 81).

## LAW AND DISCUSSION

The Underwriters assert that the "following form" provision in Section Three of the Package Policy unambiguously incorporates the mandatory arbitration provision of the AEGIS policy. They further argue that, based upon that incorporation of a mandatory arbitration clause into the policy, it is subject to a federal analysis under the criteria set forth in *Sedco, Inc.* v. *Petroleos Mexicanos Mexican Nat. Oil Co.*, 767 F.2d 1140 (5th Cir. 1985).

Pioneer argues that upon application of the appropriate state law to the contract, the following form provision in Section Three does not incorporate the mandatory arbitration provision of the AEGIS policy into the Package Policy and, therefore, fails to meet the threshold requirement for the application of the *Sedco* analysis. The Underwriters, however, argue that state law should play no part in the court's resolution of the motion before it (doc. 83, p. 5). Specifically, the Underwriters argue that the court need not apply state law to determine a threshold question of whether there is an agreement to arbitrate the dispute, because the first inquiry of the *Sedco* analysis asks whether there is an agreement in writing to arbitrate the dispute.[1] *Id*

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[1] The four questions that compose the "limited inquiry" set forth in *Sedco* are as follows: (1) is there an agreement in writing to arbitrate the .dispute; in other words, is the arbitration agreement broad or narrow; (2) does the agreement provide for arbitration in the territory of a Convention signatory; (3) does the agreement to arbitrate arise out of a

The court disagrees with the Underwriters' interpretation of the principles established in *Sedco.* In *Sedco,* there was no dispute that the parties had agreed in writing that they would submit to arbitration "any dispute or difference between the parties." After noting that fact, the court stated that "[t]he Convention contemplates a very limited inquiry by courts when considering a motion to compel." *Sedco,* 767 F.2d at 1144. The *Sedco* court then listed the four questions that a court must answer when considering a motion to compel arbitration under the Convention.

The first inquiry in the *Sedco* analysis requires the court to ask, "is there an agreement in writing to arbitrate the dispute; in other words, is the arbitration broad or narrow; . . . . ?" *Id.* A footnote further elaborated on the first inquiry of the *Sedco* analysis as follows:

> As the court in *Prudential Lines, Inc.* v. *Exxon Corp.,* 704 F.2d 59, 64 (2d Cir 1983) said: [s]imply stated, a court should compel arbitration, and permit the arbitrator to decide whether the dispute falls within the clause, if the clause is "broad." In contrast, if the clause is "narrow," arbitration should not be compelled unless the court determines that the dispute falls within the clause. Specific words or phrases alone may not be determinative although words of limitations would indicate a narrower clause. The tone of the clause as a whole must be considered.

*Sedco,* 767 F.2d at 1144-45, n. 10.

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commercial legal relationship; (4) is a party to the agreement not an American citizen? *Sedco,* 767 F.2d at 1144-45.

Clearly, the first inquiry of the *Sedco* analysis addresses the scope of an arbitration agreement rather than its existence. It presumes that a valid, written agreement to arbitrate exists and asks whether that written agreement to arbitrate covers the specific dispute before the court. If the written arbitration agreement is arguably broad enough to cover the dispute at issue, the court should refer the matter to arbitration to determine whether arbitration is the proper forum for resolution of the underlying dispute.

The distinction between the existence of a written agreement to arbitrate and the scope of such an agreement is significant because different standards apply. If the parties have clearly agreed to a broad mandatory arbitration clause that arguably covers the substantive dispute between them, then they can hardly object to arbitration as a means of determining whether the underlying dispute is properly a subject of arbitration. That approach is consistent with the goal of the Convention "to encourage recognition and enforcement of commercial arbitration agreements and international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." See e.g., *Acosta* v. *Master Maintenance and Constr. Inc.*, 452 F.3d 373, 376 (5th Cir. 2006); *Scherk* v. *Alberto-Culver* Co., 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974). That approach also reflects an "unambiguous policy in favor of recognition of arbitration agreements falling under the Convention." *Acosta,* 452 F.3d at 376-77 (noting that provisions of the Federal Arbitration Act "independently and explicitly empower[] courts to

compel arbitration in accordance with the arbitration agreements involved").[2]

However, "[f]ederal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties; instead ordinary contract principles determine who is bound." *Datatreasury Corp.* v. *Wells Fargo & Co.*, 522 F.3d 1368, 1372 (5th Cir. 2008); see also *Graves* v. *BP America, Inc.*, 568 F.3d 221 (5th Cir. 2009) (stating that the issue of a valid agreement to arbitrate is controlled by "ordinary state-law principles that govern the formation of contracts," whereas the scope of the arbitration clause is determined "by applying the federal substantive law of arbitrability"). Thus, "in deciding whether there is a valid agreement between the parties, the Fifth Circuit applies state law." *Id.* at 1371 (citing *Fleetwood Enters., Inc.* v. *Gaskamp*, 280 F.3d 1069, 1072 (5th Cir. 2002).

The Package Policy contains forty-two "General Insuring Conditions," which are "APPLICABLE TO ALL SECTIONS OF THIS POLICY" (doc. 1-5, pp. 23-25 (emphasis in original)). Clause Thirty-Six of the General Insuring Conditions is captioned "Disputes," and paragraph A of that clause addresses arbitration as follows:

> In the event it is mutually agreed by the Assured and Underwriters to arbitrate any dispute arising under this Policy, the matter

[2] *See*, 9 U.S.C, § 206: A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

> shall be submitted for arbitration in accordance with the following . . .

(Policy, General Insuring Conditions, Cl. 36 ¶ A (doc. 1-5, p. 33)).

The plain language of the arbitration provision demonstrates that mutual agreement is a prerequisite for dispute resolution through arbitration. Thus, the policy specifically provides for permissive arbitration rather than mandatory arbitration. Moreover, Clause Thirty-Six also provides that:

> If any dispute is not resolved through arbitration in accordance with paragraph A. of this Clause 36, it is agreed that in the event of the failure of the Underwriters severally subscribing this insurance (the Underwriters) to pay any amount claimed to be due hereunder, the Underwriters, at the request of the Assured, will submit to the jurisdiction of a court of competent jurisdiction within the United States of America.

(*Id.* at, ¶ B (p. 34)).

Clause 40 of the General Insuring Conditions further provides that the "policy shall be subject to the applicable US state or US federal law to be determined by the court of competent jurisdiction as determined by the provisions of the Service of Suit Clause (USA) CL 355." *Id.* at Cl. 40 (p. 35).

Thus, the parties agreed not only that mutual agreement is a condition that must be met before a dispute can be submitted to arbitration, put also specifically provided for suit in a court of competent jurisdiction in the event that they do not mutually agree to arbitrate the dispute. The Underwriters,

however, argue that the following form provision of Section Three of the policy renders that section subject to mandatory arbitration. The following form provision provides:

> Subject to the Limit and Excess specified in the Declarations and any paramount exclusions contained in the General Conditions, this Section Three shall follow the terms and conditions maintained by the Named Insured with Associated Electric & Gas Insurance Services Limited ("AEGIS") — policy # X0602A1A05 — the "Underlying Insurance", including any separate or extract policy issued by or caused to be issued by AEGIS from the foregoing.

(Policy, § 3, CL 1 (doc. 1-6, p. 23)).

The underlying AEGIS policy provides in pertinent part:

> Any controversy or dispute arising out of or relating to this POLICY, or the breach, termination or validity thereof, which has not been resolved by non-binding means as provided herein within ninety (90) days of the initiation of such procedure, shall be settled by binding arbitration in accordance with the CPR Institute Rules for Non-Administered Arbitration of Business Disputes (the "CPR Rules") by three (2) independent and impartial arbitrators.
>
> * * *
>
> The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. §§ 1, et seq., and judgment upon the award rendered

> by the arbitrators may be entered by any court having jurisdiction thereof.

(AEGIS Policy, § IV(R), ¶ 3 (doc. 1-7, p. 19).

The mandatory arbitration provision of the AEGIS Policy, incorporated into the agreement by the following form provision in Section Three, clearly conflicts with provisions of the General Insuring Conditions which provide for arbitration only upon mutual consent and also provide for suit in the absence of such mutual consent to arbitration. Therefore, the threshold question before the court is whether, under "ordinary state-law principles that govern the formation of contracts," the policy demonstrates that the parties made a valid agreement to arbitrate. In answering that question, the court need not determine whether Louisiana or Texas law controls, because the result is the same under either.

Under Louisiana law, "[a]n insurance policy is a contract between parties and should be construed employing the general rules of interpretation of contracts set forth in the Louisiana Civil Code. *Reynolds* v. *Select Props., Ltd.*, 634 So.2d 1180, 1183 (La.1994). "Contract interpretation is a determination of the common intent of the parties." *Casares* v. *James M. Brown, Builder, Inc.*, _ So. 3d _, 2009 (La.App. 2 Cir. 2009) (quoting, La.Civ.Code art. 2045). Moreover, "[e]ach provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." *Id.*, (quoting La.Civ. Code art. 2050). "That any ambiguity in an insurance policy is to be strictly construed against the insurer and in favor of the insured is a maxim so well known in the law as to require no need to resort to authority in

support thereof." *Pizzetta* v. *Lake Catherine Marina, LLC*, 995 So.2d 26, 28 (La.App. 4 Cir. 2008).

Under Texas law, "[i]t is.a fundamental rule of law that insurance policies are contracts and as such are controlled by rules of construction which are applicable to contracts generally." *Barnett* v. *Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex.2003). Moreover:

> Whether a contract, like an insurance policy, is ambiguous is a question decided by examining the entire contract in light of the circumstances present when the parties entered the contract. A policy is unambiguous, as a matter of law, if the court can give it a definite legal meaning. On the other hand, if a policy is subject to more than one reasonable interpretation, we must adopt the construction most favorable to the insured when we resolve the uncertainty.

*State Farm Fire and* Cas. *Co.* v. *Vaughan,* 968 S.W.2d 931, 933 (Tex.1998) (internal citations omitted).

The incorporation of a mandatory arbitration clause into the Third Section of an insurance agreement that also contains permissive arbitration and right to sue clauses that are "APPLICABLE TO ALL SECTIONS OF THIS POLICY," creates ambiguity. It could be argued that incorporation of the mandatory arbitration clause creates an exception in Section Three to the permissive arbitration that is otherwise applicable to the rest of the policy. Construing the contract in that manner, however, requires the court to ignore the fact that the policy contains specific language in bold, capital

letters providing that permissive arbitration is "APPLICABLE TO ALL SECTIONS OF THIS POLICY." It could also be argued that the parties specifically bargained for, and agreed, that all sections of the Package Policy would be subject to the permissive arbitration provision in the General Insuring Conditions, thus creating an exception to the following form provision insofar as it might otherwise be construed as providing for mandatory arbitration of disputes arising under Section Three.

As noted above, whether the court applies Texas or Louisiana law, ambiguity in an insurance policy must be construed in favor of the insured. Accordingly, the court concludes that no valid agreement exists between the parties to submit the disputes to arbitration.

This action was removed on an allegation of federal question jurisdiction based upon the applicability of the Convention to this dispute. Though the notice of removal alleged facts sufficient to defeat the May 5, 2008 motion to remand, the court specifically noted in its ruling on that motion that the ruling was not based on an evaluation of the merits or contract interpretation.[3]

The Underwriters' motion to compel arbitration, however, requires the court in this ruling to engage in contract interpretation. In doing so, the court has determined that the Package Policy does not present a valid agreement to arbitrate. Because the Convention only applies to valid commercial arbitration agreements in international contracts the court also concludes that the Convention is not

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[3] See *supra*, Facts and Procedural History (*citing* doc. 56, pp. 10-12)

applicable to the dispute before the court and federal question jurisdiction is, therefore, absent.

Federal courts are courts of limited jurisdiction, and "[a]bsent jurisdiction conferred by statute, district courts lack the power to consider claims." *Veldhe[illegible] United States Coast guard,* 35 F.3d 222, 225 (5th Cir. 1994). Moreover, pursuant to 28 U.S.C. §1447(c), "[i]f at any time before final judgment, it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

**CONCLUSION**

Accordingly, this matter shall be **REMANDED** to the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana.

Baton Rouge, Louisiana, October 7, 2009.

/John V. Parker/
JOHN V. PARKER
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

## APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PIONEER NATURAL RESOURCES, U.S.A., INC., ET AL.

FILED
U.S. DIST COURT
MIDDLE DIST OF LA
2009 OCT - 7 P 1:48
SIGN _____
BY DEPUTY CLERK

VERSUS

CIVIL ACTION
NO. 08-227-JVP

ZURICH AMERICAN INSURANCE CO., ET AL

**ORDER**

In accordance with the ruling of the court (98);

**IT IS ORDERED** that this matter be remanded to the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana.

Baton Rouge, Louisiana, October 7, 2009.

_____/John V. Parker/_____
JOHN V. PARKER, JUDGE
MIDDLE DISTRICT OF LOUISIANA

cc: 19th JDC

## APPENDIX F

## IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-31031

PIONEER NATURAL RESOURCES USA, INC.; PIONEER NATURAL RESOURCES COMPANY,

Plaintiffs - Appellees

vs.

U.S. COURT OF APPEALS
FILED
JAN. 27 2010
CHARLES R. FULBRUGE III
CLERK

ZURICH AMERICAN INSURANCE CO; MUTUAL MARINE OFFICE INC, on behalf of New York Marine & General Insurance COMPANY; XL INSURANCE COMPANY, Through XL Marine and Offshore Energy; ARCH INSURANCE COMPANY; LIBERTY MUTUAL INSURANCE COMPANY; CERTAIN INTERESTED UNDERWRITERS AT LLOYDS LONDON, Watkins, Syn.# ; Hiscox, Syn.#0033; Wellington Syn.#2020; Navigators; Aspen Re; Aegis, Syn. #1225; O'Farrell, Sync #1036; K1ln,Syn.#0510; HCC; Brit. Syn.#2987; St. Paul Syn. #5000; SL, Syn #120; AMERICAN OFFSHORE INSURANCE SYNDICATE,

Defendants – Appellants

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

ON PETITION FOR REHEARING EN BANC

(Opinion _____, 5 Cir. _____, _____ F.3d _____)

Before HIGGINBOTHAM, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

__/Patrick S. Higginbotham/__
United States Circuit Judge

# APPENDIX G

## STATUTORY PROVISIONS INVOLVED

### 9 U.S.C. § 201 *et seq.*

**§ 201. Enforcement of Convention**

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

**§ 202. Agreement or award falling under the Convention**

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

**§ 203. Jurisdiction; amount in controversy**

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have

original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

**§ 204. Venue**

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

**§ 205. Removal of cases from State courts**

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

**§ 206. Order to compel arbitration; appointment of arbitrators**

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether

that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

**§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding**

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

**§ 208. Chapter 1; residual application**

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

**9 U.S.C. § 16**

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

**28 U.S.C. § 1447(d)**

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.